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Supreme Court of the United States

No. 484

MARGARET ARNOLD ET AL.,
Petitioners,
VERSUS
THOMAS P. MCAULIFFE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRIT OF CERTIORARI

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DECEMBER 14, 1949.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners, Margaret Arnold, Pauline Thurston, Della Shull, Nellie Finch, Leo A. Seeley, Pauline Owen, Frank Seeley, Margaret Whitaker, and Anna S. Marcell, seek the review of the judgment of the Supreme Court of the State of Oklahoma, which presents a substantial Federal Constitutional question.

The Supreme Court of the State of Oklahoma affirmed a decision of the District Court of the State of Oklahoma.

The title of the case below is:

MARGARET ARNOLD ET AL. V. THOMAS P. MCAULIFFE ET AL.

The case has been officially reported in 209 Pac. (2d) 866.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION

Jurisdiction exists by virtue of Title 28, United States Code Annotated, Section 1257, Subsection 3; 62 Statutes 992.

The Supreme Court of the State of Oklahoma, being the court of last resort of said state, rendered its final judgment in this case wherein the title, rights and privileges under the Constitution of the United States were specially set up and claimed by petitioners, to-wit: That they should not be denied their vested rights in real property located in the State of Oklahoma without due process of law and that they were entitled to equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States (R. 435; 520; 2; 558; 597 and 616).

DATE OF JUDGMENT

The Supreme Court of the State of Oklahoma handed down its opinion on May 17, 1949, (R. 545); thereafter, within time allowed by the rules of that Court, to-wit,

June 13, 1949, petitioners filed their Petition for Rehearing (R. 558), and on June 28, 1949, said Petition was denied, (R. 596); thereafter, and within the time allowed by said rules, to-wit, on July 2, 1949, petitioners filed Application for Leave to File Second Petition for Rehearing (R. 597), and said Second Petition was denied on July 19, 1949 (R. 615), and on the same date, July 19, 1949, the petitioners by leave of Court filed their Application for Leave to File Third Petition for Rehearing (R. 616), and said Court seventy-seven days later and on October 4, 1949, again denied petitioners any relief (R. 645), and mandate issued on October 6, 1949.

CONSTITUTIONAL QUESTION PRESENTED

Whether the decision of the Supreme Court of the State of Oklahoma was so arbitrary and capricious as to deny to petitioners their rights to due process of law and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

SPECIFICATION OF ERRORS

The Supreme Court of the State of Oklahoma erred:

1. In affirming the decision of the District Court of Oklahoma County, Oklahoma.

2. In arbitrarily and without authority of law enforcing a secret oral agreement which was an invalid execution of a power to sell land under the laws of the State of Oklahoma, thus taking petitioners' vested property rights from them and giving to one of the respondents in this action, without compensation or legal sanction.

3. In failing to apply and consider certain statutory provisions enacted for the protection of petitioners and other persons in a similar position and in refusing to consider, discuss or recognize in any manner those statutory provisions, as well as certain decisions of the Oklahoma Supreme Court, giving definite vested and fixed rights to petitioners.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The decision of the Supreme Court of Oklahoma enforced an oral agreement as a valid execution of a power of sale of land contrary to express statutory provisions and its prior decisions thereon, and refused to consider and ignored such statutory provisions and prior decisions, and deprived the petitioners of their property without compensation and transferred such property to another, which decision was so arbitrary and capricious as to constitute a denial of petitioners' rights to due process of law and to equal protection of the law under the Fourteenth Amendment to the United States Constitution.

MANNER IN WHICH THE CONSTITUTIONAL QUESTION WAS RAISED

Objection in the trial court to testimony concerning alleged oral agreement to convey the land by a life tenant on grounds it was "an attempt to convey an interest in land by an alleged oral agreement which is invalid under the provisions of the Oklahoma Law (R. 435, 436). In the Motion for New Trial petitioners urged that the decision was contrary to the law (R. 520, 524). In the Petition

in Error filed in the Supreme Court of Oklahoma it was pointed out that the judgment of the trial court was contrary to law (R. 2). In each Petition for Rehearing filed in the Supreme Court of Oklahoma it was urged that the opinion of the state court was to deny petitioners equal protection of the law and constituted a denial to them of due process of law under the Constitution of the United States (R. 558; 597 and 616).

The question here is a substantial one since it involves a fundamental right of the petitioners to have their property rights protected; the question is one of substance since their property was taken from them by judicial decree contrary to the statutory law of the State of Oklahoma and prior decisions of the Oklahoma Supreme Court.

STATEMENT OF THE CASE

All the petitioners are non-residents of the State of Oklahoma and the prevailing defendant, Pat McAuliffe (Respondent herein) is a resident of Oklahoma County, Oklahoma (R. 80 and 392). All the parties to the action were vested remaindermen, in the 166 acres of land involved in this action, under the will of Michael Feeney, deceased. Rachael Feeney, his wife, was the life tenant with power to sell. Their four daughters were the named remaindermen. Two of the daughters passed away before Michael Feeney and their children, the petitioners, took their interests, totaling an undivided 5/9ths interest in said property. McAuliffe, in 1921, inherited ½ of the interest of his wife, a sister to two of the petitioners, being an undivided 1/12th interest in said property.

In 1911, Michael died, and his will was duly probated. The life tenant took over the property then and operated until 1923. In February, 1923, it is conceded that the life tenant gave a deed to said property to McAuliffe for the sole purpose of getting a loan on the premises, and McAuliffe was to reconvey to her. McAuliffe went to the life tenant to reconvey the premises and the trial court found that "she announced that she had changed her mind and that she did not want the land reconveyed to her; that it was her desire that the title be vested in Thomas P. McAuliffe in consideration that he would pay" all her bills and expenses. These matters are shown in the opinion of the Supreme Court of Oklahoma (R. 545-557).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners realize that this Court will not usually take jurisdiction merely because the court of last resort of a state has construed local rules or statutes contrary to the expectation of petitioners.

Petitioners, however, contend that rights in real property were fixed and vested in them by Oklahoma law and that the decision of the Supreme Court of Oklahoma was arbitrary and capricious in refusing to discuss or apply that law and thereby took away the property of petitioners and gave it to another, without compensation, and that such decision was so arbitrary and capricious as to deny to petitioners their rights to due process and equal protection

of the law afforded by the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment guarantees that a State shall not deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law.

This Court has held that the decision of a state court, as well as legislative action, can result in a denial of due process and of equal protection of the law under such Amendment.

Shelley v. *Kreamer et al.*,
334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 836;
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 74 L. ed. 1107;
Scott v. *McNeal*,
154 U.S. 34, 38 L. ed. 897;
Mo.-Pacific Railway Co. v. *Nebraska*,
164 U.S. 403, 41 L. ed. 489.

The power of the state to create and enforce property interests must be exercised within the boundaries defined by said Fourteenth Amendment, and the action of state courts in enforcing substantive common-law rules formulated by those courts, may result in a denial of the rights guaranteed by such Amendment, even though the judicial proceeding in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. *Shelley* v. *Kreamer*, *supra*.

This Court also has lately held that whether a state court denied rights asserted under local law protection guaranteed by such Amendment is a question on which

this Court's judgment may be invoked. *Demorest et al.* v. *City Bank Farmers Trust Co. et al.*, 321 U.S. 36, 64 S. Ct. 384. Also, that this Court may inquire whether the decision of a state court denying constitutional protection to rights asserted under local law, though on nonfederal grounds, rests on a fair or substantial basis. *Demorest et al.* v. *City Bank Farmers Trust Co. et al., supra.*

This Court also has reviewed a decision of a State Supreme Court in which the state court held a statute to be invalid, but did not discuss a later statute, and this Court said that in reviewing that decision it is not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision. *McCullough* v. *Commonwealth of Virginia*, 172 U.S. 102.

In *Baltimore & Ohio Railway Co.* v. *U.S.*, 264 U.S. 258, 68 L. ed. 667, 44 S. Ct. 317, this Court said that to refuse to consider evidence introduced in a hearing, or to make an essential finding without supporting evidence, is arbitrary action.

The *Demorest et al.* v. *City Bank Farmers Trust Co. et al. case, supra,* involved the question of whether the New York statute had deprived petitioners of rights as remaindermen asserted by them to exist prior to the statute, by virtue of previous decisions of the New York court of last resort. This Court in that case inquired into whether the decision of the New York court upholding the validity of the statute constituted such a denial of the rights so asserted under local law as to be a denial of protection afforded them by said Fourteenth Amendment.

This Court will note the action at bar is between remaindermen, who were cotenants at all times involved herein. The rights of third parties are not involved. Petitioners recognized that they have no right to attack persons who have dealt with the defendant, McAuliffe, depending upon there having been a valid execution of the power of sale. This is evidenced by the fact that petitioners dismissed this action as to the Continental Oil Company, which is producing oil and gas from the premises involved herein, under an oil and gas lease executed by McAuliffe (R. 13). Nor were any parties brought into this case who have purchased part of the minerals from him, depending upon the deed to him as being a valid execution of the power of sale.

The Supreme Court of Oklahoma in the case at Bar held, in its decision, that the will of Michael Feeney gave to his widow a life estate in the land concerned here, with power to sell the land not accompanied by any trust, and remainder over in petitioners and defendant, McAuliffe (R. 554).

At the time of the death in 1911 and probate of the will of Micheal Feeney, and ever since, the following statutes were in effect:

> "A power can be executed *only* by a written instrument which would be sufficient *to pass the estate* or interest *intended to pass under the power*, if the person executing the power was the actual owner" (Emphasis supplied).
>
> Title 60, O. S. 1941, Section 224.

"Where the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this article."

Title 60, O. S. 1941, Section 228.

"Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee absolute in favor of creditors, purchasers and incumbrancers, *but subject to any future estates limited thereon, in case the power should not be executed,* or the property should not be sold for the satisfaction of debts" (Emphasis supplied).

Title 60, O. S. 1941, Section 262.

These statutory provisions were read into and became a part of said will and fully fixed at death of the testator. *Watkins* v. *French*, 149 Okla. 205, 209, 299 Pac. 900; *Hann* v. *City of Clinton*, 131 Fed.(2d) 978; *Osborn* v. *Nicholson*, 80 U.S. 654, 13 Wall. 654, 20 L. ed. 689; *Rees* v. *City of Watertown*, 86 U.S. 107, 19 Wall. 107, 22 L. ed. 72. Thus at the death of Michael Feeney these petitioners' rights as remaindermen were vested and fixed under said will and the above statutory provisions. Subsequent decisions of courts could not impair or destroy these rights. *Aetna Life Ins. Co.* v. *Hoppin*, 214 Fed. 928; and *Hann* v. *City of Clinton, supra*, 131 Fed.(2d) 978, in which the Federal Court construed the law of Oklahoma. These rights of petitioners as remaindermen, therefore, could be divested only by a valid execution of the power of sale by the life tenant in accordance with said statutory provisions.

Oklahoma is one of the states that has enacted statutory law on the subject of Powers. Sections 181 through 299, Title 60, O. S. 1941, cover all the subject of powers in connection with real property. They were part of the Revised Laws of 1910 and have remained unchanged.

The Supreme Court in the case at Bar determined that the power granted the life tenant by said will was an absolute power to sell not accompanied by any trust. The court held:

> "We consider the situation here is not different in principle from that which obtained in *Miller* v. *Irey et al.*, 150 Okl. 240, 1 P. 2d 654, and on authority of that case hold that the power of disposition vested in the life tenant is within the purview of Tit. 60, O.S. 1941, Section 266, and therefore absolute and not in trust" (R. 554).

Said Section 266, Title 60, O. S. 1941, cited by the Oklahoma Supreme Court reads:

> "Every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose of the entire fee, in possession or expectancy, for his own benefit. R. L. 1910, Section 6720."

The court, however, failed to mention either of said Sections 224 or 262, *supra*.

The *Miller* v. *Irey case*, 150 Okla. 240, 1 Pac. (2d) 654, so relied upon by the Oklahoma Supreme Court in the case at Bar also concerned whether a life tenant with full power of sale, remainder over, had executed the power by virtue of a written contract to sell, followed by a deed to the purchaser. The court held that the life tenant had the power to convey full fee title and did so by virtue of

the written contract and deed, for the consideration of support and maintenance, certain additional stipulated income, and release by grantee of a $1,000.00 debt owing by grantor. The court there applied the above quoted Sections 262 and 266. In that case, of course, there was no question of an oral agreement as being the execution of the power.

The Oklahoma court in the *Miller* v. *Irey case, supra,* cited the case of *Watkins* v. *French,* 149 Okla. 205, 299 Pac. 900, as authority that the life tenant had power to sell the fee. The *Watkins* v. *French case* had before it the meaning of above Section 262 and held that a creditor of the life tenant, who had power to sell land, had a right to levy execution on the land under a judgment against the life tenant. The court there points out that the States of Alabama and New York have almost identical power statutes as Oklahoma, and quotes extensively from two Alabama decisions, *Rutledge* v. *Crampton,* 43 So. 822, and *Head* v. *Lane,* 65 So. 343.

The Alabama case so cited, *Rutledge* v. *Crampton,* 43 So. 822, is in point as to the meaning of said power statutes requiring the execution of a power to be in writing and the rights of remaindermen in case of an absolute power not accompanied by a trust. There the life tenant signed a petition in a suit for partition of the land to which she was given a life estate with power to sell. The purchaser at the partition sale was sued after death of the life tenant by the remaindermen to recover the land on the ground

that the power had never been executed. The Alabama court said:

> "* * * We have a statute, however, prescribing how powers must be exercised, and there is no latitude for the courts to uphold any exercise thereof short of a substantial compliance with the statute.* * *
>
> "* * * We repeat that Mrs. Bell did not take the absolute estate, except as to creditors or purchasers, because she was given but a life estate; and, while she was given the power of sale, there is an express remainder over to the children of the property undisposed of by Mrs. Bell at the time of her death. * * *
>
> "* * * It is true that she may have petitioned for the sale in writing; but the statute requires such an instrument in writing, 'which would be sufficient in law to pass under such power, if the person executing the power were the actual owner,' and the petition was not sufficient to pass title. * * *"

The other Alabama case so cited by the Oklahoma Supreme Court in the *French case, Head* v. *Lane,* 65 So. 343, also is in point. There the life tenant was allegedly insane when she made a deed; she died and the remaindermen sued the grantee of the deed. The Alabama court said (65 So. 343 at 344):

> "If the life tenant was insane when she made the conveyance of the property, there certainly was no valid execution of the power of sale. If the conveyance is invalid — if, in fact, there has been no valid execution of the power of sale by the life tenant — then certainly a court of chancery can give to the present true owner of the property the relief which she needs."

The Oklahoma Supreme Court in the *Watkins* v. *French case, supra,* concluded, as to said Section 262, O. S. 1941 (149 Okla. 205 at 209):

> "That provision of our law was in effect long prior to the execution of the will and, under the rule, was read into and became a part of the will. This court has not heretofore determined the construction that should be given the section. We think, however, that it should be construed as similar statutes have been construed by the courts of other states."

Thus, the court repeated and applied the rule of law that said statute became a part of and is read into the will of Michael Feeney. Further, this case thus recognizes that the decisions of the other states having similar statutes should control in Oklahoma.

In *Allen* v. *DeWitt*, 3 N.Y. 276, an executor with a power to dispose, gave a deed to a devisee, without consideration, for the purpose of enabling the devisee to secure a debt then pressing the devisee. The court said:

> "* * * But if it be deemed a sale by the executor, it was a gross perversion and abuse of the power conferred upon him by the will and vests no title in anyone receiving the fruits of this breach of trust with knowledge of the circumstances. * * *"

These statutory provisions of Oklahoma requiring that a power of sale of land can be validly executed only by a written instrument which would be sufficient to pass the estate intended to pass under the power and the rights of the remaindermen where no power has been validly executed, and as defined by the decisions, became vested rights and remained vested rights at all times in petitioners the same as if written into the will at the time of the death of Michael Feeney. The Supreme Court of Oklahoma should not now be held to have the power to

cut off such rights. As pointed out in the *Hann* v. *City of Clinton case, supra,* 131 Fed.(2d) 978, at Page 983, concerning the law of Oklahoma:

> "And it is likewise the prevailing rule of law in that State, in harmony with that elsewhere, that the settled judicial construction placed upon a statute becomes as much a part as the text itself, so far as contract rights are concerned; and in point of impairment of the obligation of the contract, a change of the decision after the rights are acquired is to all intents and purposes the same in its effect as amendment of the law by means of a legislative enactment."

Even if this involved only a rule of property, still this Court has held that any change is fraught with danger, for many titles to land would be injuriously affected.

> *United States of America* v. *Title Insurance & Trust Company,* 265 U.S. 472, 44 S. Ct. 621, 68 L. ed. 1110.

In the case at Bar, there is no claim by McAuliffe that the deed in February, 1923, by the life tenant to him was intended to be a deed. There is no claim that this deed was intended to be an execution of the power of sale. He paid no money to her. The deed only appeared to be a deed so that a loan company could take a mortgage on the land signed by McAuliffe who appeared by the record to be the owner under a purported deed reciting a consideration of $5,000.00. Thus, it is admitted that the written instrument was not signed or delivered for the purpose of executing the power. Thus there was no deed — there was no actual passage of any title to the land as between McAuliffe and the petitioners, the remaindermen. As between them and McAuliffe it was as if the life tenant were insane,

as if she had never signed the written deed. He took no title as against the remaindermen.

Thus by our Oklahoma Statute and decisions, there having been no execution of the power by said deed, the petitioners, remaindermen, remained the owners of their rights as if no deed had been signed, and at her death became vested with a full fee title, unless some later act by her before her death in 1928 was a valid execution of the power of sale.

The only other act that was made by her, according to McAuliffe and the Supreme Court of Oklahoma, was the purported oral agreement by the life tenant with McAuliffe in April, 1923.

After McAuliffe made the mortgage as requested by the life tenant, he returned to the hospital where the life tenant stayed, with the intention to "reconvey" the land to her. MCAULIFFE testified and the court found that:

> "Whereupon, she announced that she had changed her mind and that she did not want the land reconveyed to her; that it was her desire that the title be fully vested in said Thomas P. McAuliffe in consideration that he would pay all her existing bills and continue to pay all her bills and expenses to the hospital, doctors and otherwise, to which offer, in the presence of all the parties, said Thomas P. McAuliffe in all things accepted said offer" (R. 550).

It is not claimed nor did the court find that petitioners, who were non-residents then and at all times of said Oklahoma County, where the transactions occurred, ever were aware of the existence of said purported deed or were aware of the alleged oral agreement until shortly before this suit

was begun. Petitioners objected to the testimony as being incompetent, as hearsay, and as being an attempt to prove a verbal sale of land in violation of the Oklahoma law (R. 435; 520: 2). The trial court and the Oklahoma Supreme Court, however, found that McAuliffe proved the existence of the parol agreement, and that he did carry out his part of the parol agreement. The Supreme Court decided that the deed conveyed naked legal title and that the equitable title remaining in the life tenant was passed or relinquished by her verbal agreement and his performance, thus deciding that these constituted a valid execution of the power and passed title in fee to McAuliffe and divesting the title of these remaindermen, petitioners (R. 545-557).

The petitioners urged most strenuously to the Supreme Court of Oklahoma that the said Section 224, requiring that the only way a power of sale could be executed was by a written instrument intended to execute the power, and said Section 262 as to the rights of remaindermen remaining where there was no valid execution of the power, were directly applicable to the case at Bar (R. 580; 584). Nowhere in its decision, however, did it mention either of said sections or discuss any reason, legal or equitable, why these sections did not apply.

Petitioners, as previously stated, have found no decision of this Court holding that a State Supreme Court has the right to ignore statutes and decisions which vest rights in petitioners and give property of petitioners to another. We realize there is no way to tell, but we feel that it is proper to assume that many Oklahoma testators

have died believing that in view of Sections 224 and 262, 60 O. S. 1941, *supra*, that the rights in remainder created by them would be protected. Petitioners view the Supreme Court of Oklahoma with the greatest of respect, but with due respect to that court, petitioners believe that the effect of the decision of that court in the case at Bar clearly shows that it ignored the rights of petitioners under said Sections 224 and 262, O. S. 1941, *supra*, and the decisions thereon, and thereby rendered such an arbitrary and capricious action of the State as to result in a denial of petitioners, rights to due process of the law and to equal protection of law guaranteed them by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, petitioners pray that a Writ of *Certiorari* be issued in this case so that the important and substantial Constitutional question may be fully presented and argued before this Court.

Respectfully submitted,

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DECEMBER 14, 1949.

CERTIFICATE

I, counsel for petitioners, hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

JAMES R. EAGLETON,
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DECEMBER 14, 1949.